BORNEO HOUSING MORTGAGE FINANCE BHD.

v.

LEE SHEN FONG @ JOSEPH FRANCIS

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[SUIT NO. T. 100 OF 1988]
12 OCTOBER 1993

PRACTICE AND PROCEDURE: Application for summary judgement - Application opposed by defendant - Whether issues raised by defendant triable issues.

CONTRACT: Loan Agreement - Memorandum of Charge and Guarantee - Construction - Whether Memorandum of Charge means registered Memorandum of Charge - Memorandum of Charge left undated at the time of execution - Whether date on Memorandum of Charge a "term" of the contract - Whether there was effective execution - Rights of guarantor - Whether guarantor discharged from Guarantee - Whether guarantor privy to Loan Agreement.

EVIDENCE: Memorandum of Charge dated six years after execution - Evidence adduced to show that Memorandum of Charge executed on a date other than the date stated in Memorandum - Whether evidence admissible - Evidence Act 1950 - Whether ss. 91, 92 of the Act applicable.

WORDS AND PHRASES: "Memorandum of Charge".

By a Loan Agreement Cum Assignment dated 24 May 1984 a loan was granted by the plaintiff to two persons (Borrower).The loan was guaranteed by the defendant and a Guarantee Deed was executed to this effect. At the same time the Loan Agreement Cum Assignment and the Guarantee were executed, a Memorandum of Charge was executed by the Borrower, but due to unavailability of the subtitles of the property which was the subject of the charge, the Memorandum of Charge was left undated.It was only dated on 20 March 1990 and subsequently registered under the Sabah Land Ordinance (Cap. 68) on 23 March 1990.

The Borrower defaulted in payment and in the ensuing suit taken by the plaintiff, the property identified in the Memorandum of Charge was sold by auction by the plaintiff on 19 March 1993. Meanwhile, in a seperate suit taken on 21 October 1988, the plaintiff issued a writ against the defendant,as guarantor to the loan, claiming a sum of RM 533,181.58. This amount was later reduced to RM 416,443.72 on account of the proceeds obtained from the auction sale. No seperate demand was made by the plaintiff for the reduced amount.

The plaintiff applied for summary judgement in respect of the writ they had issued against the defendant.The application was opposed by the defendant and the question before the court was whether the points of objection as pleaded by the defendant constituted triable issues.

Held:

[1] It is trite law that a word in a document must be given its ordinary and plain meaning. The words "Memorandum of Charge" mean simply that it could be one that has not yet been registered or one that has already been registered under the Land Ordinance. The date of execution of the Memorandum of Charge is not a "term" of a contract. Any evidence given as to the fact that the Memorandum of Charge was executed on a certain date other than the date stated on the Memorandum of Charge cannot therefore be evidence contradicting, varying, adding or substracting from the terms of the Memorandum of Charge and they do not attract the application of ss. 91 and 92 of the Evidence Act 1950. Therefore there is no triable issue here.

[2] Clause 2 of the Guarantee envisages two situations - one where the defendant is sued after the property had been auctioned and the proceeds are insufficient to satisfy the loan and the other where the defendant is sued before the property is auctioned. In the former case, the plaintiff would have to make a request for payment before he can commence action but not in the latter case. As the defendant in this case is sued before the property is auctioned, there is no necessity for the plaintiff to make another request for payment of the reduced claim.There is no issue for trial on this point.

[3] The contradicting figures of the statement of account and the incomprehensible manner in which the plaintiff sought to reconcile the different figures, belie the correctness, and as a result, undermine the conclusiveness of the alleged sum owing by the defendant. What is the exact amount which the defendant is liable under the Guarantee is therefore an issue to be tried.

[4] A surety is not entitled to notice of the principal debtor's default unless there is a contract express or implied that such notice shall be given. In this case, there is nothing in the Guarantee or any other document that confers any right on the defendant or imposes a duty on the plaintiff to inform the defendant that the interest rate for the loan payable by the borrower had been varied nor to inform the defendant that the Borrower had defaulted.This is not a triable issue.

[Interlocutory judgement entered for plaintiff].

Cases referred to:
Mayban Finance Bhd. v. Industrade Credit Corp. Sdn. Bhd. & 4 Ors. [1991] 3 CLJ 1820 ***(refd)***
Citibank N.A v. Mohd Abdullah Ang Swee Kang & 2 Ors [1992] 1 CLJ 116 ***(refd)***
Malayan Banking Bhd. v. Bakelite Manufacture Sdn. Bhd. & 4 Ors. [1992] 1 CLJ 447 ***(refd)***
YM Orang Kaya Menteri Paduka Dato Wan Ahmad Isa Shukri bin Wan Rashidi v. Kwong Yik Bank Berhad [1989] 2 CLJ 148 ***(refd)***
MBf Finance Berhad v. Hasmat Properties Sdn. Bhd. & 3 Ors. [1990] 1 CLJ 106 ***(refd)***
The Hongkong and Shangai Banking Corporation Limited v. Kaline Holdings Sdn. Bhd & 4 Ors. [1992] 2 CLJ 1286 ***(foll)***
Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd. [1986] 2 MLJ 184 ***(refd)***
Bank Bumiputra (M) Bhd. v. Ramlah binti Abdul Moktik & 2 Ors. [1990] 1 CLJ 761 ***(not foll)***

Legislation referrred to:
Contracts Act 1950
Evidence Act 1950, ss. 91 & 92
Sabah Land Ordinance (Cap. 68)

Other sources referred to:
The Digest, Vol. 26, Paras 842, 843
The Modern Contract of Guarantee, Pillips & O'Donavan, 1985, 2nd Edn., pp. 341, 379

For the plaintiff - Yong Sui Ling; M/s. Alex Pang & Co.
For the defendant - Francis Chia; M/s. Lawrence Chai & Peter Soong

JUDGMENT

Ian H.C. Chin J:
This is an application for summary judgement. The plaintiff by a writ issued on the 21 October 1988 claims against the defendant a sum of RM533,181.58 together with interest at 14% per annum from the 1 June 1988 to the date of payment under a guarantee dated the 24 May 1984 ("Guarantee") in respect of a loan given to two persons ("Borrower"). At the hearing on the 7 September 1993, Ms. Yong Sui Ling, Counsel for the plaintiffs, indicated that the plaintiffs are only seeking judgment for the sum of RM416,443.72 instead of the larger sum claimed in the writ on account of an auction sale of the property that was the subject of the Memorandum of Charge. Judgment against the borrower was on the 12 November 1986 entered for the sum of RM 393,192.97 under a separate suit. On the 20 May 1989 the plaintiffs took out the present application for summary judgment. It is unnecessary to reproduce the defence filed by the defendant because some of the grounds of defence were abandoned at the hearing of the present application on the 7 September 1993. The issues for trial, as contended by Mr. Francis Chia, Counsel for the defendant, are as follows:

(1) The Guarantee requires the plaintiff to obtain a Memorandum of Charge from the borrowers and this was not done resulting in the discharge of the defendant;
(2) There was no demand made to the defendant for the payment of the reduced amount;
(3) The statement of accounts are not conclusive of the amount owing because they are not certified by the proper officers;
(4) The defendant was not given notice of the variation of interest in respect of the loan to the Borrower; and
(5) The defendant was not given any notice of default of payment by the Borrower.

Issue (1) Memorandum of Charge

Mr. Francis Chia argued that the Guarantee was executed upon the premise that the loan to the Borrower was, quoting the relevant words of the Guarantee, "upon the security of a Memorandum of Charge (herein after called "the security document") executed by the Borrower dated the ... day of ... one thousand nine hundred and ... (19....) in respect of the land and premises held under or comprised in L.215350351, Kota Kinabalu". The undisputed facts are that apart from a Loan Agreement Cum Assignment ("Loan Agreement"), a Memorandum of Charge (exhibit "LFM-1") was executed by the Borrower on the 24 May 1984, at the same time the defendant signed the Guarantee. See para 10 of the affidavit filed on behalf of the plaintiffs by Lim Fong Mee and affirmed on 27 August 1993 and exhibit "LFM-5", a letter of a firm of advocates who attended to the execution of the Memorandum of Charge. The Memorandum of Charge was not at that time dated because the subdivided titles

were not yet available. After the subdivided title was ready the Memorandum of Charge was dated the 20 March 1990 and subsequently registered under the Land Ordinance on the 23 March 1990. Mr. Francis Chia argued that since the Memorandum of Charge was expressed to have been signed the 20 March 1990, evidence to show its execution on another date is prohibited by ss. 91 and 92 of the Evidence Act 1950 and, irrespective of the subsequent registration of the Memorandum of Charge, there was effectively no Memorandum of charge executed by the Borrower at the time of the signing of the Guarantee. Hence the requirement of a Memorandum of Charge being executed at the time of the execution of the Guarantee was not met and the defendant is as a result thereof discharged from his Guarantee. The Court was referred by Mr. Francis Chia to Pillips & O'Donovan on **The Modern Contract of Guarantee,** 2 Edn., at p. 341, which reads:

> ... But the Courts are sometimes prepared to infer a condition that additional securities be obtained and the basis for doing so often lies in the wording of the recital of the guarantee. In *Greer v. Kettle* the recital was in these terms:
>
> > Whereas the corporation have at the request of the guarantors advanced to [the borrowers] the sum of two hundred and fifty thousand pounds on the security of a charge dated 20 March one thousand nine hundred and twenty-nine on the shares particulars of which are set out in the schedule hereto.
>
> This wording, together with a provision in the body of the guarantee, led the Court to conclude that there was a condition precedent to the guarantor's obligation that the debt must be secured by a charge on the shares specified in the schedule ...

The Court was also referred to the case of *Mayban Finance Bhd. v. Industrade Credit Corp. Sdn. Bhd. & 4 Ors.* [1991] 3 CLJ 1820, at p. 1822-1823, where Dr. Zakaria Mohd. Yatim J. said:

> Where the terms of the guarantee require that certain remedies be taken against the principal or that certain collateral securities be obtained by the creditor for the principal, such condition must be satisfied by the creditor before the guarantor is rendered liable. O'Donovan, **The Modern Contract of Guarantee,** 1985, at p. 379.

It was additionally argued by Mr. Francis Chia that the words "Memorandum of Charge" in the Guarantee must refer to a registered Memorandum of Charge. In relation to ss. 91 and 92 of the Evidence Act 1950, the Court was referred to *Citibank N.A. v. Mohd Abdullah Ang Swee Kang & 2 Ors.* [1992] 1 CLJ 116 and *Malayan Banking Bhd. v. Bakelite Manufacture Sdn. Bhd. & 4 Ors.* [1992]1 CLJ 447.

It is trite law that a word used in a document must be given its ordinary and plain meaning. The words "Memorandum of Charge" mean simply that and it could be one that has not yet been registered or one that has already been registered under the Land Ordinance. That the words refer to or mean an unregistered Memorandum of Charge can be gathered from clause 9 of the Guarantee which says:

> 9. The [defendant] hereby agrees and confirms that, if the security document referred in the recital to this Agreement is not a registered or registrable Memorandum of Charge and the Borrower subsequent to the date of this Agreement and in compliance with the provisions of the security document by himself or by his attorney executes a Memorandum of Charge in favour of the Company in substitution for the security document, this Agreement shall bind the [defendant] to guarantee the due performance by the [two persons] of [their] obligations under such Memorandum of Charge and all references herein to "security document" shall thereafter be construed as referring to such Memorandum of Charge.

As for ss. 91 and 92 of the Evidence Act 1950, it is to be noted that what is prohibited is evidence that contradicts, varies, adds to or subtracts from the terms of the Memorandum of Charge. The date of execution of the Memorandum of Charge is not a "term" of a contract. Any evidence given as to the fact that the Memorandum of Charge was executed on a certain date other than the date stated in the Memorandum of Charge cannot, therefore, be evidence contradicting, varying, adding or subtracting from the terms of the Memorandum of Charge and they do not attract the application of ss. 91 and 92 of the Evidence Act 1950. The cases referred to by Mr. Francis Chia relate to the construction of terms in the guarantee and loan agreement and not in relation to the date of execution of the documents; they are not relevant. Therefore, even assuming that it is a precondition that there should be a Memorandum of Charge executed by the Borrower at the time of execution of the Guarantee before the Guarantee is

enforceable against the defendant, the precondition has been satisfied with the execution of the Memorandum of Charge though it was dated and registered subsequent to the execution of the Guarantee. There is no triable issue here.

Issue (2) No Demand for Reduced Amount

It was next argued by Mr. Francis Chia that there must be a request for payment, as provided by clause 2 of the Guarantee, after the auction sale of the property and there was no such request making the action premature. To better understand this contention, a short summary of the relevant undisputed facts ought to be mentioned and they are these. This application for summary judgment was first heard on the 30 October 1989 where at that date and at the request of the parties, the matter was adjourned. The property, which was the security for the loan to the Borrower, was sold by auction on the 19 March 1993 pursuant to the provisions of the Land Ordinance and rules made thereunder. By the affidavit of Lim Fong Mee affirmed on the 14 May 1993, it was averred that a sum of RM432,829.54, instead of the sum of RM533,181.58 claimed in the writ, was owing as a result of the auction sale. By another affidavit of the same person affirmed on the 27 August 1993, it was asserted by a certificate that the amount owing should be RM416,443.72. Mr. Francis Chia argued that there should be demand for payment of the sum of RM416,443.72 before the defendant can be sued for the amount. For ease of reference, clause 2 of the Guarantee which Mr. Francis Chia relied on for his contention is reproduced here:

> In the event of the [Plaintiffs] exercising its right of sale in respect of the property pursuant to the security document then should the proceeds of such sale after deducting all the expenses thereof and incidental thereto (hereinafter called "the net proceeds") be insufficient to pay all monies due and owing to the company by the Borrower the Guarantor shall, at the request of the Company, forth with pay to the Company a sum representing the different between the net proceeds and the monies than due and owing to the Company.

He also referred to the cases of *YM Orang Kaya Menteri Paduka Dato Wan Ahmad Isa Shukri bin Wan Rashidi v. Kwong Yik Bank Bhd.* [1989] 2 CLJ 148 and *MBf Finance Berhad v. Hasmat Properties Sdn. Bhd. & 3 Ors.* [1990] 1 CLJ 106. There was a demand for payment (exhibit "FAGT-4") before the writ was issued but the application for judgment was not dealt with for many years with the result that, in the meantime, the proceeds of an auction sale of the property was applied towards reduction of the amount owing by the Borrower and which the defendant guaranteed. Hence, the application of the plaintiff for a lesser sum than that claimed in the writ. The plaintiff, as I have in *The Hongkong and Shanghai Banking Corporation Limited v. Kaline Holdings Sdn. Bhd. & 4 Ors.* [1992] 2 CLJ 1286 said, has the right to commence legal action at the time or before or after the plaintiffs are taking or have taken proceedings under the Land Ordinance against the property of the Borrower. To construe clause 2 of the Guarantee in the manner advocated by Mr. Francis Chia would have the result that the plaintiff having properly demanded payment and thereafter having properly commenced action for a proper amount of money has now to redemand payment and to recommence action for recovery of the money just because the plaintiff was honest enough to inform the Court that the property, after the commencement of the action herein, had been sold pursuant to the provisions of the Land Ordinance and had thus reduced the amount of the liability of the defendant. This surely cannot be what the parties had intended. Clause 2 of the Guarantee envisages two situations - one where the defendant is sued after the property had been auctioned and the proceeds are insufficient to satisfy the loan and the other, where the defendant is sued before the property is auctioned. In the former case, the plaintiff would have to make a request for payment before he can commence action and not in the latter case. All that is required is for the plaintiff to explain by affidavit how the difference in the sum claimed and the sum now asked for has been arrived at. See *Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd.* [1986] 2 MLJ 184 . As for the cases referred to by Mr. Francis Chia, it suffice for me to say that they pertain to consideration of different wordings in a document and can therefore be distinguished from the facts of the present case. I also find that there is no triable issue here.

Issue (3) Statement of Account not conclusive

Another argument of Mr. Francis Chia is that the statements of accounts are not conclusive because they are not signed by the proper officer and the various figures are not reconcilable. The complaint is directed at three statements of

account, viz., one dated 29 June 1988 showing RM533,181.58 to be due ("FAGT-3"), one where the date is not shown and where only half a signature is shown and showing RM432,829.54 to be due at the 16 April 1993 ("LFM-3") and one dated the 21 August 1993 and showing RM416,443.72 to be due ("LFM-2"). No evidence was offered apart from the bare assertion that the relevant statements of account were not signed by the proper officers. Whereas it is asserted in the affidavits filed on behalf of the plaintiffs that the statement of account ("FAGT-3") was "prepared and certified by officers of the plaintiffs" and "who were officers duly authorised by the plaintiffs to do so". Nothing was said as to whether the statements of accounts "LFM-2" and "LFM-3" were prepared by duly authorised officers of the plaintiffs but then again the defendant had not shown that the person or persons who prepared the said statements of account are not authorised persons, which burden the law casts upon the defendant to show. However, the contradicting figures of the said three statements of account and the incomprehensible manner in which the plaintiffs sought to reconcile the different figures, in paras. 4, 5 and 6 of the affidavit of Lim Fong Mee affirmed on the 27 August 1993, belie the correctness, and as a result, undermine the conclusiveness, of alleged sum owing by the Borrower or by the defendant. Some of the legal fees charged to the Borrower or the defendant are obviously questionable, like the bill dated 13 February 1984 for RM25.00 ("LFM-1b"). The Borrower signed the Loan Agreement and the Memorandum of Charge only on the 24 May 1984 and no explanation was given why the Borrower or the defendant should be answerable for legal fees incurred more than 2 months before. There are also those legal fees shown in the bills "LFM-1k" and "LFM-3c" which were incurred neither by the Borrower nor by the defendant. What is the exact amount which the defendant is liable under the Guarantee is therefore an issue to be tried.

Issues (4) and (5) Right to Notice of variation of interest and default of payment

Nothing in the Guarantee or in any other document confers any right on the defendant or imposes a duty on the plaintiff to inform the defendant that the interest rate for the loan payable by the Borrower had been varied nor to inform the defendant that the Borrower had defaulted. As for the notice of default, the defendant was in fact informed by a letter dated the 5 July 1988 (exhibit "FAGT-4"). In any event, a surety is not entitled to notice of the principal debtor's default unless there is a contract express or implied that such notice shall be given. See the cases reported in **The Digest,** Vol. 26, paras. 842 and 843. As for the right to notice of variation of interest, Mr. Francis Chia argued that since the defendant is, under clause 6 of the Guarantee, deemed a principal, he is entitled to notice just as the Borrower is entitled under the loan documents, and this, according to him, is a triable issue. Mr. Francis Chia referred to the case of *Bank Bumiputra (M) Bhd. v. Ramlah binti Abdul Moktik & 2 Ors.* [1990] 1 CLJ 761, at p. 764, where Lim Beng Choon J. held that whether a guarantor is entitled to such notice is a question of law which cannot be settled summarily. I respectfully disagree that the point cannot be settled summarily. It is for the defendant to show that he has such a right. Mr. Francis Chia cannot point to any document which confers such a right on the defendant or imposes a duty on the plaintiff to give such notice to the defendant. He cannot refer to any authorities in support of his contention. Clause 6 of the Guarantee which Mr. Francis Chia relied on for his argument in fact deals with the liabilities of the defendant to the plaintiff as if the defendant is the principal debtor, and not with the defendant's rights against the plaintiff. Clause 6 does deal with the rights of the defendant but only in relation to the rights of the defendant against the Borrower and not against the plaintiff. I cannot see and Mr. Francis Chia had not shown the court how clause 6 of the Guarantee can be interpreted to mean that the defendant is entitled to be given notice of variation of interest which the plaintiff was, under the Loan Agreement, bound to give to the Borrower. Since the defendant was not privy to the Loan Agreement, I cannot see how the defendant can claim the benefit of any of the terms in the Loan Agreement. It is also not one of those rights given to a surety by the Contracts Act 1950. This is also not a triable issue.

In the premises, I would order interlocutory judgment to be entered for the plaintiff for damages to be assessed and costs to be taxed.